TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~250~~.

THE UNITED STATES, PLAINTIFFS IN ERROR,

vs.

LEO L. FERRARY, WILLIAM Y. CONN HANNUM, AND JOHN ALEXANDER DYER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TENNESSEE.

FILED SEPTEMBER 18, 1874.

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1 Transcript of the record and proceedings in a cause lately determined in the United States circuit court for the district of East Tennessee, in which the United States of America are plaintiffs and Leo Leander Ferrary, William Young Conn Hannum, and John Alexander Dyer are defendants, to wit:

Declaration.

Circuit court within the sixth circuit, at Knoxville, Tennessee, to July term, 1871.

UNITED STATES OF AMERICA,
District of East Tennessee:

The United States of America, plaintiffs, complain of Leo Leander Ferrary, William Young Conn Hannum, and John Alexander Dyer, all citizens of said district, defendants, who are now sued of a plea that they render to the said United States of America the sum of five thousand ($5,000) dollars, which they owe to and unjustly detain from the plaintiffs.

For that whereas the said defendants, Leo Leander Ferrary, William Young Conn Hannum, and John Alexander Dyer, heretofore, to wit, on the 8th day of November, 1870, at, to wit, in the district aforesaid, by their writing obligatory, signed with their names and sealed with their seals and executed and approved as the law directs, which writing obligatory is here now to the court shown, the date whereof is a certain day and year above named, to wit, the day and year aforesaid, acknowledged themselves to be held and firmly bound unto the United States of
2 America in the full and just sum of five thousand dollars, above demanded, to be paid to the said plaintiffs, which said writing obligatory was and is subject to the conditions following, that is to say:

That whereas the said Leo Leander Ferrary did engage and intended, on and after the 15th day of November, 1870, to be engaged in the business of a distiller within the second collection-district of the State of Tennessee, to wit, at situate in the town of Louisville, county of Blount, and State aforesaid:

Now, therefore, if the said Leo Leander Ferrary should in all respects faithfully comply with all the provisions of law in relation to the duties and business of distillers and should pay all penalties incurred or fines imposed on him for a violation of any of the said provisions, and should not suffer the lot or tract of land on which the distillery stood, or any part thereof, or any of the distilling apparatus to be encumbered by mortgage, judgment, or other lien during the time in which he should carry on said business, then this obligation to be void; otherwise to remain in full force.

And the plaintiffs say that the said Leo Leander Ferrary did not in all respects faithfully comply with all the provisions of law in relation to the duties and business of distillers, and did not pay all penalties incurred or fines imposed on him for a violation of any of the said
3 provisions, and did suffer the lot or tract of land on which the distillery stood, or some part thereof, and also the distillery apparatus, to be encumbered by mortgage, judgment, and other lien, during the time in which he carried on said business.

Wherefore plaintiffs say that the conditions of said writing obligatory have been broken by reason of the matters aforesaid and the obligation remains in full force, and an action hath accrued to the plaintiffs to have and maintain their said action against said defendants, and to have

and recover said sum of five thousand dollars above demanded, yet the said defendants, though often requested so to do and to pay the said sum, hath not as yet paid the same or any part thereof, but hitherto and still neglect and refuse to pay the same, to the damage of said plaintiffs of five thousand ($5,000) dollars, and therefore they bring this suit.

E. C. CAMP,
U. S. Dist. Atty., District of East Tenn.

(Endorsed:) No. 431. Declaration. United States vs. Leo L. Ferrary et al. Filed May 23, 1871. H. M. Aiken, clerk.

Summons.

The President of the United States of America to the marshal of the eastern district of Tennessee, greeting:

You are hereby commanded to summon Leo Leander Ferrary, William Young Conn Hannum, & John Alexander Dyer, if they be found
4 in your district, to be and appear before the judges of the circuit court of the United States in the sixth circuit, for the district of East Tennessee, at the court-house in Knoxville, in said State, on the 2d Monday in July next, then and there to answer unto the United States of America of a plea that they render to the said United States of America the sum of five thousand ($5,000) dollars, which they owe to and unjustly detain from the said United States of America. Herein fail not; and have you then and there this writ.

Witness the honorable Salmon P. Chase, esq., Chief-Justice of the Supreme Court of the United States, this the 2d Monday in January, in the year of our Lord one thousand eight hundred and seventy-one, and of the Independence of the United States the 95.

H. M. AIKEN, *Clerk.*

(Endorsed:) No. 431. United States vs. Leo. L. Ferrary et al.

This summons was issued on the 23 day of May, 1871.

H. M. AIKEN, *Clerk.*

Came to hand when issued, and executed by summoning the within-named defendants, Leo L. Ferrary & Wm. Young Conn Hannum, & delivering to them one copy of the summons, and also a copy of the declaration to each, at Maryville, Tennessee, May 29th, 1871.

D. M. BOYD,
Deputy U. S. Marshal.

Executed on John Alexander Dyer June 5th, 1871, in Blount County.

N. H. GREER,
Deputy U. S. M.

5 *Demurrer.*

UNITED STATES OF AMERICA *vs.* LEO LEANDER FERRARY ET AL. } No. 131. Debt. Demurrer.

And the said defendants, by their attorney, come and defend the wrong and injury, when, &c., and say that the said declaration and the matters therein contained, in manner and form as are above stated and set forth,

are not sufficient in law for the said plaintiff to have or maintain the aforesaid action thereof against them, the said defendants, and they are not bound in law to answer the same; and this the said defendants are ready to verify. Wherefore, by reason of the insufficiency of the said declaration in this behalf, the said defendants pray judgment, and that the said plaintiff may be barred from having or maintaining the aforesaid action thereof against them, &c.

And the said defendants, according to the form of the statute in such case made and provided, states and shows to the court here the following causes of demurrer: 1st. That is to say; that the said plaintiff's declaration is neither in debt nor covenant in form, but partakes of the nature of both debt and covenant, commencing in debt and concluding in covenant, and thus offers or tenders a double issue.

6 2d. That the said declaration does not contain any such averment as is sufficient to convey notice to the said defendants of the particular matter on which said action is founded; upon what substantive fact the plaintiff's right of action rests.

First, the said declaration is commenced in debt, and alleges a specific amount or sum certain of money to be owing to the said plaintiff and remaining due, and unjustly obtained from the said plaintiff; but the conditions of the bond and the averments of the declaration are such as show the cause of action to be some supposed violations of "the provisions of law and regulations in relation to the duties and business of distillers," &c., &c., by the said defendant, Leo Leander Ferrary.

And secondly, the said declaration shows by its averments that the cause of action is founded upon, or supposed and assumed to be founded upon, a penal bond, upon which no action will lie unless the conditions thereof have been broken by a non-compliance therewith, and the said plaintiff cannot have and maintain said action with the double issue presented by the said declaration.

7 3d. That the said plaintiff does not aver in the said declaration any specific breach or violation of the conditions of the bond, of which profert is made and on which said action is founded.

4th. That the said plaintiff does not aver in the said declaration that the bond of which profert is made and on which the said action is founded was executed under and by virtue of any law of the land authorizing the same.

5th. That the said plaintiff does not aver in the said declaration that the violations of the provisions of the said bond are identical with the provisions of law, the violations of which are complained of by the said plaintiff in the said declaration.

6th. That the averments of said declaration are not certain to a common intent so as to develop a single issue, in that the said declaration commences in debt and concludes in covenant.

7th. That the said declaration does not contain such specific averments as to carry notice to the said defendants of the character and kind of matter against which they are to defend.

8 8th. That an action cannot be maintained by plaintiff against said defendants on the vague and uncertain and general averments of said declaration that the said defendant', Leo Leander Ferrary , did not in all respects comply with the provisions of law and regulations in relation to the duties of distillers, &c., and such being the only assignment in the said declaration, the said defendants are not bound to answer except by demurrer, and this the said defendants are ready to verify.

Wherefore, in consideration of the premises, the said defendants pray

judgment of the court, whether said plaintiff ought to further have or maintain said action against them, and that said declaration may be quashed, &c.

HOUK & ADKINS,
Attys. for Defendants.

And now comes L. C. Houk, one of the attorneys for the said defendants, and says that in his opinion the foregoing demurrer is well taken in law, and the same is therefore filed.

L. C. HOUK,
Attorney, &c.

(Endorsed:) Demurrer. No. 431. United States vs. Leo Leander Ferrary et al. Filed 26 Sept., 1871. H. M. Aiken, clerk.

9 *Pleas.*

UNITED STATES OF AMERICA
vs.
LEO LEANDER FERRARY ET AL. } Debt on bond. Pleas.

And the said defendants come, by their attorney, and defend the wrongs and injuries, when, &c., &c., and crave oyer of the said supposed writing obligatory in the said declaration mentioned, and it is read to them, &c.; they also crave oyer of the conditions of the said supposed writing obligatory, and it is read to them in these words:

That whereas the said Leo Leander Ferrary now , or intends, on and after the 15th day of November, 1870, to be, engaged in the business of a distiller within the second collection-district of the State of Tennessee, to wit, situated in the town of Louisville, county of Blount, and State aforesaid:

Now, therefore, if the said Leo Leander Ferrary shall in all respects faithfully comply with all the provisions of law in relation to the duties and business of distillers, and shall pay all penalties incurred or fines imposed on him for a violation of any of the said provisions, and shall not suffer the lot or tract of land on which the distillery stands, or any part thereof, or any of the distilling apparatus to be encumbered by mortgage, judgment, or other lien during the time in which he shall carry on said business, then this obligation shall be void; other-
10 wise it shall remain in full force.

Which being heard and read, the said defendants say that they do not owe the said sum of money in the said declaration mentioned; because they say that the said Leo Leander Ferrary did from time to time, and at all times after the making of the said writing obligatory and the said conditions thereof, well and truly observe, perform, fulfil, and keep all and singular the articles, clauses, payments, conditions, and agreements in the said conditions of the said writing obligatory specified, comprised, and mentioned in the things therein contained on his part and behalf to be observed, performed, fulfilled, and kept, according to the tenor and effect, true intent and meaning of the said condition of the said writing obligatory; and this the said defendants are ready to verify. Wherefore they pray judgment if the said plaintiff ought to have or maintain the aforesaid action against them, &c.

HOUK & ADKINS.

STATE OF TENNESSEE, *Knox County:*

In person come before me, the undersigned authority, L. L. Ferrary, and made oath that the above plea is true in substance and in fact.

LEO L. FERRARY.

Sworn to and subscribed before me this Sept. 29, 1871.

H. M. AIKEN, *Clk.*

11 (Endorsed:) No. 431. United States vs. Leo L. Ferrary et al. Pleas. Filed Jany. 13, 1872. H. M. Aiken, clerk.

Replication.

Circuit court of the United States for the district of East Tennessee.

UNITED STATES
vs.
LEO L. FERRARY, WILLIAM Y. C. HANNUM, & JOHN A. DYER.

And the said plaintiffs, as to the plea of the said defendants by them above pleaded, say that they, the said plaintiffs, by reason of anything in the said plea alleged, ought not to be barred from having and maintaining their aforesaid action thereof against them, the said defendants; because they say that the said Leo L. Ferrary, having given bond as aforesaid as a distiller, did not in all respects faithfully comply with all the provisions of law and regulations in relation to the duties and business of distillers, in this, to wit, that after the execution and delivery of the said writing obligatory, to wit, on the first day of February, 1871, and on divers other days and times before and after that day, there were lawfully assessed against the said Leo L. Ferrary, as such distiller as aforesaid, and in relation to and on account of his duties and business as such distiller, certain taxes on behalf of and in favor of
12 the said United States, to wit, to the amount of two thousand dollars and nineteen cents, which said taxes it was then and there the duty of the said Ferrary, and he was then and there bound by the provisions of law in relation to the duties and business of distillers to pay to the said plaintiffs, yet the said Leo L. Ferrary, William Y. C. Hannum, and John A. Dyer, although often requested so to do, did not nor did either of them account for or pay to the plaintiffs the taxes assessed as aforesaid, nor any part thereof, but have therein wholly failed and made default; and so the said sum of money is still wholly unpaid and unsatisfied to the said plaintiffs, contrary to the form and effect of the said conditions of the said writing obligatory; and this the said plaintiffs are ready to verify. Wherefore they pray judgment and their debt aforesaid, together with their damages by them sustained on occasion of the detention thereof to be adjudged to them, &c.

GEO. ANDREWS,
U. S. Dist. Atty., Dist. E. Tenn.

Rejoinder.

And the defendants, for rejoinder to the replication of the plff. by him above pleaded by atty., say that after the execution & delivery of the bond sued on, & prior to the bringing of this suit, there were

13 no taxes legally assessed against the said Leo L. Ferrary as distiller, which he was bound by law to pay to the United States, & which remained unpaid when this suit was brought; and of this they put themselves upon the country.

THORNBURG & McGUFFY,
Attos. for Defts.

Filed July 18, 1874. H. M. Aiken, clerk.

And the plaintiffs do the like.

GEO. ANDREWS,
Dist. Atty.

Filed July 18, 1874. H. M. Aiken, clerk.

(Endorsed:) No. 431. United States vs. Leo L. Ferrary et al. Replication filed January 19, 1872. H. M. Aiken, clerk.

Be it remembered that at a circuit court of the United States began and held, for the district of East Tennessee, at the court-house in the city of Knoxville, within said district, upon the second Monday, it being the 13th day, of July, 1874—present and presiding, the honorable Connally F. Trigg, judge of the United States district court for the districts of Tennessee—the following proceedings were had, to wit:

THURSDAY MORNING, *August* 13, 1874.

Court met pursuant to adjournment.

14 Present and presiding, the honorable Connally F. Trigg, judge of the United States district court for the districts of Tennessee.

THE UNITED STATES
vs.
LEO L. FERRARY, WM. YOUNG CONN HANNUM, & John Alexander Dyer. } Debt. No. 431.

Came the district attorney for the United States, and the defendants, by attorney, and came also the following jury, to wit: I. P. Alley, T. C. Hunter, A. G. Jackson, R. H. Armstrong, Caleb Keyhill, W. H. Turley, W. P. Hayes, James O'Brien, J. J. Crawford, G. W. Leath, B. F. Smith, and J. J. Angell, good and lawful men of the district of East Tennessee, who, being duly elected, tried, and sworn to try the issue joined between the United States and the defendants, are, from rendering a verdict, respited until to-morrow.

And afterwards, at the said July term, 1874, of *of* said court, the following proceeding was had, to wit:

FRIDAY MORNING, *August* 14, 1874.

Court met pursuant to adjournment.

Present and presiding, the honorable Connally F. Trigg, judge of the United States district court for the districts of Tennessee.

THE UNITED STATES
vs.
LEO L. FERRARY, WM. YOUNG, CONN HANNUM, & John Alexander Dyer. } Debt. No. 431.

15 Came the district attorney for the United States, and the defendants, by attorney, and came also the jury heretofore sworn in this

case, to wit: I. P. Alley, T. C. Hunter, A. G. Jackson, R. H. Armstrong, Caleb Keyhill, W. H. Turley, W. P. Hayes, James O'Brien, J. J. Crawford, G. W. Leath, B. F. Smith, and J. J. Angell, who, from rendering a verdict, are respited until to-morrow.

And afterwards, at the said July term, 1874, of said court, the following proceeding was had, to wit:

SATURDAY MORNING, *August* 15, 1874.

Court met pursuant to adjournment.

Present and presiding, the honorable Connally F. Trigg, judge of the United States district court for the districts of Tennessee.

THE UNITED STATES
vs.
LEO L. FERRARY, WM. YOUNG CONN HANNUM, & John Alexander Dyer. } Debt. No. 431.

Came the district attorney for the United States, and the defendants, by attorney, and came also the jury heretofore sworn in this case, to wit: I. P. Alley, T. C. Hunter, A. G. Jackson, R. H. Armstrong, Caleb Keyhill, W. H. Turley, W. P. Hayes, James O'Brien, J. J. Crawford, G. W. Leath, B. F. Smith, and J. J. Angell, who, from rendering a verdict, are respited until Monday next.

And afterwards, at the said July term, 1874, of said court, the following proceeding was had, to wit:

16 MONDAY MORNING, *August* 17, 1874.

Court met pursuant to adjournment.

Present and presiding, the honorable Connally F. Trigg, judge of the United States district court for the districts of Tennessee.

THE UNITED STATES
vs.
LEO L. FERRARY, WM. YOUNG CONN HANNUM, & John Alexander Dyer. } Debt. No. 431.

Came the district attorney for the United States, and the defendants, by attorney, and came also the jury heretofore sworn in this case, to wit: I. P. Alley, T. C. Hunter, A. G. Jackson, R. H. Armstrong, Caleb Keyhill, W. H. Turley, W. P. Hayes, James O'Brien, J. J. Crawford, G. W. Leath, B. F. Smith, and J. J. Angell, who, from rendering a verdict, are respited until to morrow.

And afterwards, at the said July term of said court, the following proceeding was had, to wit:

TUESDAY MORNING, *Augt.* 18, 1874.

Court met pursuant to adjournment.

Present and presiding, the honorable Connally F. Trigg, judge of the United States district court for the districts of Tennessee.

17 THE UNITED STATES
vs.
LEO L. FERRARY, WM. YOUNG CONN HANNUM, & John Alexander Dyer. } Debt. No. 431.

Came the district attorney for the United States, and the defendants, by attorney, and came also the jury heretofore sworn in this case, to

wit: I. P. Alley, T. C. Hunter, A. G. Jackson, R. H. Armstrong, Caleb Keyhill, W. H. Turley, W. P. Hayes, James O'Brien, J. J. Crawford, G. W. Leath, B. F. Smith, and J. J. Angell, who, upon their oath, do say they find the issue in favor of the defendants.

It is therefore considered by the court that the defendants go hence, and that the costs upon behalf of the United States be taxed and certified for allowance.

Bill of exceptions.

Circuit court of the United States for the district of East Tennessee.

UNITED STATES
vs.
LEO L. FERRARY, WILLIAM YOUNG CONN Hannum, and John Alexander Dyer.

This cause coming on for trial on this 13th day of August, 1874, before the presiding judge of the circuit court of the United States for the district of East Tennessee, and a jury of said district, and thereupon the plaintiffs, to maintain the issue on their part, introduced evi-
18 dence before said court and jury tending to show that the defendant, Leo L. Ferrary, carried on and operated a distillery for the manufacture of whiskey in the county of Blount, in the second collection-district of Tennessee, from the 16th day of December, 1870, to the 10th day of March, 1871; that before commencing said business, to wit, on the 10th day of November, 1870, B. P. Stacy, assistant assessor for said district, together with W. R. Cooper, who had been designated by the Commissioner of Internal Revenue for that purpose, proceeded to said distillery, at the request of said Ferrary, to measure the tubs in said distillery and to estimate its true producing capacity, as required by section ten of the act of July 20th, 1868, entitled "An act imposing taxes on distilled spirits and tobacco, and for other purposes." That George W. Ross, the said assessor, caused to be made in triplicate a written report of said survey, signed by said assessor and the said W. R. Cooper, who aided in making said survey, one copy of which was immediately thereafter furnished to said Leo L. Ferrary; one copy was retained by said assessor, and one copy was immediately transmitted to the Commissioner of Internal Revenue. A copy of said report of survey is hereto annexed, marked "Exhibt A." In this survey and report the producing capacity of said distillery was estimated and determined
19 upon the basis of three gallons of whiskey for each bushel of corn used.

That on the 18th day of November, 1870, said Commissioner of Internal Revenue wrote and sent to said assessor a letter, which was received by said assessor on the 22d day of November, 1870, and a copy of which is hereunto annexed, marked "Exhibit B;" that upon receipt of said letter, said B. P. Stacy, as assistant assessor, and said W. R. Cooper, as designated assistant, as aforesaid, in the office of said assessor in Knoxville, in said second collection-district, proceeded to make a new estimate and determination of the producing capacity of said distillery, in accordance with the instructions in said letter, and upon the basis of the measurements theretofore made as aforesaid, but did not again visit said distillery or make any new measurements of said distillery or of any part thereof. That said assessor caused to be made in triplicate a written report of said new estimate and determination, signed by said George W. Ross, as assessor, and by said W. R. Cooper, as designated assistant,

one copy of which last-mentioned report was retained by said assessor, and one copy thereof was immediately transmitted to the Commissioner of Internal Revenue. A copy of said last-mentioned report is hereto annexed, marked "Exhibit B B." In this report the producing capacity of said distillery was estimated and determined upon the basis of
20 three and one-half gallons of whiskey to each bushel of corn used, instead of three gallons, as in said former report. This report also differed from said former report in the number of dry inches allowed in certain fermenting-tubs in said distillery; but all the measurements and dimensions given and set forth of the tubs in said distillery were the same in both of said reports.

W. O. White, a witness for the plaintiffs, testified on said trial that at the several times aforesaid he was a clerk in the office and employ of said assessor; and that on the 24th day of November, 1870, he either delivered the third copy of said last-mentioned report to said Ferrary in person, or that he mailed it to him, directed to his post-office in Blount County, Tennessee, and other evidence was given on said trial tending to prove that said report was actually received by said Ferrary.

Said Leo L. Ferrary was introduced on said trial as a witness on behalf of the defendants, and testified that he never received any copy of said last-mentioned report, and that he never heard of its having been made until the month of March, 1871, and immediately before said distillery ceased to be operated and run.

Said defendants also introduced other evidence of witnesses employed in said distillery, one of whom testified that he received the mails for said Ferrary at the place where said distillery was situated,
21 tending to prove that said Ferrary never received any copy of said last-mentioned report.

Said plaintiffs also introduced in evidence upon said trial the original bond executed by said defendants and set forth in the pleadings in the cause, with the indorsements thereon, a copy of which said bond and its indorsements is hereto annexed, marked "Exhibit C."

Said plaintiffs also introduced in evidence on said trial an original assessment made by said assessor against said Ferrary in respect of his said distillery for the month of December, 1870, and January, February, and March, 1871, copies of which are hereto annexed, marked "Exhibits D," "E," "F," and "G."

All of said assessments were based upon the estimate and determination of producing capacity given in the report of survey secondly above mentioned, and of which Exhibit BB is a copy. The evidence shewed that if said assessments had been based upon the first report of survey of which Exhibit A is a copy, there still would have been a deficiency for which the defendant Ferrary would be liable to be assessed.

Upon said trial the district judge presiding in said court instructed said jury, among other things, not excepted to, that the law required that if the Commissioner of Internal Revenue was satisfied that the
22 first report of the capacity of said distillery which was made out and sent to him as above testified to, and of which Exhibit A is a copy, was in any respect incorrect or needed revision, he should direct the assessor to make in like manner another survey of said distillery, the report of which survey must be executed in triplicate and deposited as was required in case of the report of the original survey; and that if the second report of survey testified to in this case as above stated, and of which Exhibit BB is a copy, was not actually made by the assessor or assistant assessor and his designated assistant, in like manner with the survey made as the foundation of the report of survey first-above mentioned, then that said second report of survey was invalid,

and any assessments against said Ferrary based thereon would also be invalid, and the plaintiffs could not recover thereon in this action; to which said instructions the plaintiffs, by their attorney, then and there excepted.

The court also charged said jury that if they were satisfied from the evidence that the said second survey had been made and a copy thereof furnished to the defendant Ferrary, then that said Ferrary would be estopped to deny the validity of the assessment made thereon, and their verdict must be for the United States for the difference between the amount of whiskey reported by him and the assessment made thereof by the assessor upon the producing capacity of the distillery, to
23 which there was no exception, but if they should be satisfied from the evidence that a second survey had not been made, or that a copy of the same was not furnished to said Ferrary, the distiller, then their verdict must be in favor of the defendants; to which last instruction the district attorney then and there excepted.

Upon said trial the said presiding judge was requested by the district attorney on behalf of the United States to instruct said jury as follows:

1st. That the first report of survey was valid and binding until the same was abrogated by authority of law, and that was only when defendant was furnished with a copy of resurvey or second survey.

2d. That if the copy of the second report of survey ordered was furnished defendant—no matter how, so he received it—he would be bound by it; but if he never received it and continued to operate his distillery under the first one, then he would be bound by the first survey, of which defendant admits having received a copy.

Which said instruction the court refused to give to the said jury for the reason, then and there assigned by the court, that no estimate or assessment was ever made by the assessor to ascertain the defendants' liability for the deficiency of tax, if any, upon the basis of what
24 is denominated the first survey; to which refusal to give said instructions to said jury the plaintiffs, by their counsel, then and there excepted.

And thereupon the district attorney presented this his bill of exceptions, which is signed and sealed and ordered to be made a part of the record; which is accordingly done.

[L. S.] CONNALLY F. TRIGG,
Judge, presiding.

(Endorsed:) No. 431. Bill of exceptions. The United States vs. Leo L. Ferrary et al. Filed August 22, 1874. H. M. Aiken, clerk.

25—(123.) EXHIBIT A.

Report of survey of Leo. L. Ferrary' distillery, No. 4, at Louisville, county of Blount, State of Tennessee, district No. 2, made in pursuance of the requirements of section 10, act of July 20, 1868.

MASH-TUBS.

Serial number.	Greatest diameter.	Least diameter.	Mean diameter.	Depth.	Total capacity.	Dry inches.	Working capacity.	Remarks.
	Inches.	*Inches.*	*Inches.*	*Inches*	*Gallons.*		*Gallons.*	
1	105	101	103	54	1,947.81	15	1,406.76	Circular.

FERMENTING-TUBS.

Serial number.	Greatest diameter.	Least diameter.	Mean diameter.	Depth.	Total capacity.	Dry inches for corn or molasses.	Dry inches for rye.	Working capacity for corn or molasses.	Working capacity for rye.	Remarks.
	Inches.	*Inches.*	*Inches*	*Inches.*	*Gallons.*			*Gallons.*	*Gallons.*	
1	72	67	.....	57	1,190	3	7	1,128	1,044	
2	72	67	.....	57	1,190	3	7	1,128	1,044	
3	71	67	.....	60	1,236	3	7	1,174	1,091	
4	71	66	.....	60	1,217	3	7	1,156	1,075	
5	68	66	.....	61	1,185	$3\frac{1}{2}$	$7\frac{1}{2}$	1,117	1,039	
6	68	66	.....	61	1,185	$3\frac{1}{2}$	$7\frac{1}{2}$	1,117	1,039	
7	67.5	65.5	.....	63	1,206	4	8	1,129	1,053	
8	67.5	65.5	.....	63	1,206	4	8	1,129	1,053	
9	67.5	65.5	.....	63	1,206	4	8	1,129	1,053	
10	67.5	65.5	.....	63	1,206	4	8	1,129	1,053	
					12,027	.....	.....	11,336	10,544	

Total gallons of beer, working capacity, corn, 11,336; rye, 10,544; total number of bushels, capacity of fermenters, corn, 251.91; rye, 234.31. Fermenting period, 48 h'rs.

And we do hereby certify that we estimate and determine the true mashing and fermenting capacity of L. L. Ferrary' distillery, No. 4, to be 83.97 bushels of corn, 78.1 bushels of rye, (or gallons of molasses,) each twenty-four hours; and that the true spirit-producing capacity is 251.91 gallons from corn, 234.31 gallons from rye, gallons from molasses, each twenty-four hours.

Dated this 10 day of Nov., A. D. 1870.

GEO. W. ROSS,
Assessor 2 district Tenn.

WM. R. COOPER,
Designated Assistant.

(Indorsed:) Exhibit A. (123.) Report of survey of L. L. Ferrary, distillery, 2 district Tennessee, Nov. 10, 1870.

26 EXHIBIT B.

TREASURY DEPARTMENT,
OFFICE OF INTERNAL REVENUE,
Washington, November 18, 1870.

SIR: Your report of survey of the distillery of Leo L. Ferrary, No. 1, of your district, dated November 10, 1870, is regarded as erroneous in respect to the dry inches and the yield of spirit to the bushel. According to the ruling of this office 3 dry inches for rye and 7 for corn are the true allowances for tubs 60 inches, or under 60 inches, in depth. For every foot in excess of five feet of depth, $\frac{4}{10}$ of an inch for corn and $\frac{5}{10}$ for rye may be added to these allowances. None of the tubs of this distillery exceed by one foot 5 feet of depth. The greatest depth of any tub is 63 inches; the least, 57; the average, 60 inches.

It is not stated in your report whether the distillation is by direct steam or by steam through a coil. If it is by direct steam the yield should be $3\frac{1}{2}$ gallons to the bushel; but if by coil, 3 gallons.

It is furthermore questioned whether the true title and number has been given in your report to this distillery. The marked resemblance of Leo L. Ferrary's distillery No. 4 of your district to this makes such a question pertinent.

You are ordered, as provided in section 10, act of July 20, 1868, to make another survey of this distillery, and to correct, or make
27 satisfactory explanation of, any departure from instructions in letter of March 8, 1870. You will please transmit to this office a copy of such report of survey, signed by yourself and your designated assistant, and dated the day you sign it, attaching thereto your certificate of date of delivery of a copy of the same to the distiller.

As no new measurements are required in this case, no additional expense is to incurred nor allowed.

(Signed) Very respectfully,

J. W. DOUGLASS,
Acting Commissioner.

GEORGE W. ROSS, Esq.,
Assessor 2d District, Knoxville, Tennessee.

28 (123) EXHIBIT B B.

Report of survey of L. L. Ferrary distillery No. 4, at Louisville, county of Blount, State of Tennessee, district No. two, made in pursuance of the requirements of section 10, act of July 20, 1868.

MASH-TUBS.

Serial number.	Greatest diameter.	Least diameter.	Mean diameter.	Depth.	Total capacity.	Dry inches.	Working capacity.	Remarks.
	Inches.	*Inches.*	*Inches.*	*Inches.*	*Gallons.*		*Gallons.*	
1	105	101	103	54	1,947.81	15	1,406.81	Circular.

FERMENTING-TUBS.

Serial number.	Greatest diameter.	Least diameter.	Mean diameter.	Depth.	Total capacity.	Dry inches for corn or molasses.	Dry inches for rye.	Working capacity for corn or molasses.	Working capacity for rye.	Remarks.
	Inches.	*Inches.*	*Inches.*	*Inches.*	*Gallons.*			*Gallons.*	*Gallons.*	
1	72	67	.....	57	1,190	3	7	1,128	1,044	
2	72	67	.....	57	1,190	3	7	1,128	1,044	
3	71	67	.....	60	1,236	3	7	1,174	1,091	
4	71	66	.....	10	1,217	3	7	1,156	1,075	
5	68	66	.....	61	1,185	3	7	1,127	1,049	
6	68	66	.....	61	1,185	3	7	1,127	1,049	
7	67.5	65.5	.....	63	1,206	3	7	1,148	1,072	
8	67.5	65.5	.....	63	1,206	3	7	1,148	1,072	
9	67.5	65.5	.....	63	1,206	3	7	1,148	1,072	
19	67.5	65.5	.....	63	1,206	3	7	1,148	1,072	
					12,027	.....	.....	11,432	10,640	

Total gallons of beer, working capacity, 11,432 corn, 10,640 rye; total number of bushels, capacity of fermenters, corn, 256.04; rye, 236.44; fermenting period, 48 hours.

And we do hereby certify that we estimate and determine the true mashing and fermenting capacity of L. L. Ferrary's distillery, No. 4, to be 84.68 bushels of corn, 78.81 bushels of rye, (or gallons of molasses,) each twenty-four hours; and that the true spirit-producing ca-

pacity is 296.38 gallons from corn, 275.83 gallons from rye, gallons from molasses, each twenty-four hours.

Dated this 22d day of November, A. D. 1870.

GEORGE W. ROSS,
Assessor 2d District Tenn.

WM. R. COOPER,
Designated Assistant.

(Indorsed:) Exhibit B B. (123.) Report of survey of Leo L. Ferrary's distillery, second district Tennessee, Nov. 22d, 1870.

29 (30) EXHIBIT C.

UNITED STATES INTERNAL REVENUE.

Distiller's bond.

[This bond must be executed by every distiller before commencing or continuing business under this act, and on the first day of May in each succeeding year. Act July 20, 1868, Sec. 7.]

Know all men by these presents that we, Leo Leander Ferrary, of Maryville, Tennessee, as principal, and William Young Conn Hannum & John Alexander Dyer, all of Blount County, Tennessee, as sureties, are held and firmly bound unto the United States of America in the full and just sum of five (5) thousand dollars, money of the United States; to which payment, well and truly to be made, we jointly and severally bind ourselves, our heirs, executors, and administrators, firmly by these presents, sealed with our seals, and dated this 8th day of Nov., A. D. 1870.

The condition of the foregoing obligation is such, that whereas the said Leo Leander Ferrary now, or intend, on and after the 15th day of Nov., 1870, to be engaged in the business of a distiller within the second collection-district of the State of Tennessee, to wit, at , situate in the town of Louisville, county of Blount, and State aforesaid:

Now, therefore, if the said Leo Leander Ferrary shall in all respects faithfully comply with all the provisions of law in relation to the duties and business of distillers, and shall pay all penalties incurred, or fines imposed on him for a violation of any of the said provisions, and shall not suffer the lot or tract of land on which the distillery stands, or any part thereof, or any of the distilling apparatus to be encumbered by mortgage, judgment, or other lien during the time in which he shall carry on said business, then this obligation shall be void; otherwise it shall remain in full force.

LEO LEANDER FERRARY. [L. S.]
WILLIAM YOUNG CONN HANNUM. [L. S.]
JOHN ALEXANDER DYER. [L. S.]

Signed, sealed, and delivered in presence of—
WILL A. MCTEER.
SAM P. ROWAN.

[Revenue-stamp, 5 cents. Revenue-stamp, 5 cents. Revenue-stamp, 5 cents. Revenue-stamp, 5 cents. Revenue-stamp, 5 cents.]

The following instructions must be particularly observed and complied with, viz:

1st. The Christian names must be written in the body of the bond in full, and so signed to the bond.

2d. The residence of each signer must be stated in the bond.

3d. A seal of wax or wafer must be attached to each signature.

4th. Each signature must be made in the presence of two witnesses, who must sign their names as such.

5th. There must be at least two sureties, and the bond must be dated.

6th. The sufficiency of the sureties must be shown by affidavits made on the bond.

7th. A twenty-five-cent stamp must be affixed and canceled.

8th. The penal sum named in the bond should not be less than double the amount of the tax on the spirits that can be distilled during a period of fifteen days by the still or stills of which the person giving the bond has notified the assessor, nor shall it be in any case less than five thousand dollars, and should be increased from time to time, if such increase be made necessary by the increase of the number of stills.

The attention of the assessor to whom this bond may be offered for approval is called to the duty imposed upon him by the following provisions contained in section 7 of the act approved July 20, 1868, to wit:

"The assessor may refuse to approve said bond when, in his judgment, the situation of the distillery is such as would enable the distiller to defraud the United States."

"A new bond may be required in case of the death, insolvency, or removal of either of the sureties, or in any other contingency, at the discretion of the assessor or Commissioner of Internal Revenue."

STATE OF TENNESSEE,
County of Blount, ss:

William Young Conn Hannum & John Alexander Dyer, the sureties in the within bond, being severally duly sworn, say that they are severally residents in the State of Tennessee, and are each of them respectively worth five thousand dollars over and above all debts, dues, demands, and incumbrances whatever against them, besides property exempt by law from execution.

Sworn before me this 28th day of November, 1870.

(Signed) E. GODDARD,
C. & M. Chancery Court, Blount Co.

STATE OF TENNESSEE,
County of Blount, ss:

I hereby certify that on this twenty-eighth day of November, one thousand eight hundred and seventy, before me personally came William Young Conn Hannum & John Alexander Dyer, known to me to be the individuals described in and who executed the within bond, and severally acknowledged that they executed the same.

(Signed) E. GODDARD,
C. & M. Chancery Court, Blount Co., Tenn.

(Indorsed:) Exhibit C. (30.) Distiller's bond. L. L. Ferrary, Louisville. 2 dist. Tennessee.

I hereby certify that this bond is properly filled up and executed, and that the sureties thereon are, in my belief, sufficient, and I approve the same this 16th December, 1870.

(Signed) GEOR. W. ROSS,
Assessor.

Filed May 23, 1871.

(Signed) H. M. AIKEN, *Clerk.*

30 (89) EXHIBIT D.

UNITED STATES INTERNAL REVENUE.

Form of assessment of spirits, based on capacity of distillery.

[If the reported product is less than the amount to be accounted for, as determined by the assessor, or less than 80 per cent. of the capacity, as determined by the survey, an assessment should be made. When the difference between the amount to be accounted for (on the former blanks termed "required product") and the reported product is greater than the difference between the 80 per cent. and the reported product, the assessment will be upon the former quantity. When the reported product equals or exceeds the 80 per cent., the assessment will be made upon the difference between the reported product and the amount to be accounted for. If the reported product and the amount to be accounted for are each less than the 80 per cent., the assessment must be made upon the difference between the reported product and the 80 per cent. Particular attention is called to supplement 2, series 4, No. 7. The assessment of the $4-per-barrel tax and the per-diem tax, under section 13, must be made on this form.]

Computation and determination of the quantity of mash or beer fermented and distilled spirits produced in distillery No. 4 of L. L. Ferrary, ascertained from reports dated , 18 , Dec. 21, 1871, and Dec. 31, 1871, calculated in compliance with the provisions of section 20, act of July 20, 1868.

Reports.	Materials used for mash or beer.				Mash or beer.	Distilled spirits.
Tri-monthly period.	Description.	Quantities.			Reported product.	Reported product.
		Bushels.	*Pounds.*	*Gallons.*	*Gallons.*	*Gallons.*
	Amount brought forward from preceding month.					
1st to 11th ..						
11th to 21st ..	Corn	199. 33	10, 709			
21st to 1st....	"	136. 29	6, 898			
						297. 86
	Total	335. 62	17, 607		14, 672	
	Amount on hand	. 49	25. 48		2, 211	
	Total used				12, 461	

Amount of proof-spirits to be accounted for during above period of time	297. 86	gals.
Amount of proof-spirits reported as above for same period	297. 86	"
	0	gals.
Eighty per cent. on producing capacity is $12 \times 177.48 \times 80\ \%$	1, 703. 08	gals.
Amount of spirits above reported as produced	297. 86	"
Deficiency	1, 405. 94	gals.
Assessment is hereby made against L. L. Ferrary for tax on 1,405.94 gallons proof-spirits, at 50 cts. per gallon	702 97	
And $4 per barrel, special tax on 1.29 barrels of 40 proof-gallons each	5 16	
Total	708 13	
Per-diem tax on distillery, as per survey, of $4 per day for 12 days	48	
Per-diem tax on distillery during suspension of work, of $2 per day for days		

Dated at Knoxville Jan. 10, 1871.

GEOR. W. ROSS,
Assessor 2 District Tenn.

I hereby certify this to be a correct copy of assessment against L. L. Ferrary for December, 1870.

GEOR. W. ROSS, *Ass.*

(Indorsed:) (89.) Assessment of spirits against L. L. Ferrary, by G. W. Ross, assessor 2 dist. of Tenn., for the month of Dec., 1871. Exhibit D.

31 (89) EXHIBIT E.

UNITED STATES INTERNAL REVENUE.

Form of assessment of spirits, based on capacity of distillery.

[If the reported product is less than the amount to be accounted for, as determined by the assessor, or less than 80 per cent. of the capacity, as determined by the survey, an assessment should be made. When the difference between the amount to be accounted for (on the former blanks termed "required product") and the reported product is greater than the difference between the 80 per cent. and the reported product, the assessment will be upon the former quantity. When the reported product equals or exceeds the 80 per cent., the assessment will be made upon the difference between the reported product and the amount to be accounted for. If the reported product and the amount to be accounted for are each less than the 80 per cent., the assessment must be made upon the difference between the reported and the 80 per cent. Particular attention is called to supplement 2, series 4, No. 7. The assessment of the $4-per-barrel tax and the per-diem tax, under section 13, must be made on the form.]

Computation and determination of the quantity of mash or beer fermented and distilled spirits produced in distillery No. 4 of L. L. Ferrary, ascertained from reports dated Jan. 11, 1871, Jan. 21, 1871, and January 31, 1871, calculated in compliance with the provisions of section 20, act of July 20, 1868.

Reports.	Materials used for mash or beer.				Mash or beer.	Distilled spirits.
Tri-monthly report.	Description.				Reported product.	Reported product.
		Bushels.	*Pounds.*	*Gallons.*	*Gallons.*	*Gallons.*
	Amount brought forward from preceding month	49.	2, 548	.....	2, 211	.....
1st to 11th	Corn	260. 6	14, 035⅓	.....	.....	.....
11th to 21st	"	183. 61	9, 878⅔	.....	.....	.....
21st to 1st	"	159. 93	8, 625	.....	.....	.....
		.....	.....	.....	24, 584	1, 117. 94
	Total	653. 14	35, 087	.....	.....	.....
	Amount on hand	49. 48	2, 622	.....	.....	.....
	Total used	603. 66	32, 465	.....	.....	.....

Amount of proof-spirits to be accounted for during above period of time	1, 117. 94	galls.
Amount of proof-spirits reported as above for same period	1, 117. 94	"
Deficiency	.....	
Eighty per cent. on producing capacity { 7 × 177. 48 × 80 % = 993. 89 / 1. 4 × 892. 8 80 % = 999. 93 }	1, 993. 82	galls.
Amount of spirits reported as produced	1, 117. 94	"
Deficiency	875. 88	"
Assessment is hereby made against L. L. Ferrary for taxes on 875. 88 gallons proof-spirits, at 50 cts. per gallon	437 94	
And $4 per barrel special tax on 49 35-40 barrels of 40 proof-gallons each	199 30	
	637 24	
Per-diem tax on distillery, as per survey, of $2.00 per day for 17 days ..... $34.. / $4 per day for 7 days ..... 28.. }	62	
Per-diem tax on distillery during suspension of work, at $2 per day for 2 days	4	

Dated at Knoxville, Feb. 13, 1871.

GEOR. W. ROSS,
Assessor 2 District, Tenn.

I hereby certify this to be a correct copy of assessment against L. L Ferrary for Jan., 1871.

GEOR. W. ROSS, *Assessor.*

(Indorsed:) (89.) Assessment of spirits against L. L. Ferrary, by G. W. Ross, assessor 2 dist. of Tenn., for the month of January, 1872. Exhibit E.

32 (89) EXHIBIT F.

UNITED STATES INTERNAL REVENUE.

Form of assessment of spirits, based on capacity of distillery.

[If the report' produced is less than the amount to be accounted for, as determined by the assessor, or less than 80 per cent. of the capacity, as determined by the survey, an assessment should be made. When the difference between the amount to be accounted for (on the former blanks termed "required products") and the reported product is greater than the difference between the 80 per cent. and the reported product the assessment will be upon the former quantity. When the reported product equals or exceeds the 80 per cent. the assessment will be made upon the difference between the reported and the amount to be accounted for. If the product and the amount to be accounted for are each less than the 80 per cent. the assessment must be made upon the difference between the reported product and the 80 per cent. Particular attention is called to supplement 2, series 4, No. 7. The assessment of the $4-per-barrel tax and the per-diem tax, under section 13, must be made on this form.]

Computation and determination of the quantity of mash or beer fermented and distilled spirits produced in distillery No. 4 of L. L. Ferrary, ascertained from reports dated Feb. 11, 1871, Feb. 21, 1871, and Feb. 28, 1871, calculated in compliance with the provisions of section 26, act of July 20, 1868.

Reports.	Materials used for mash or beer.				Mash or beer.	Distilled spirits.
Tri-monthly period.	Description.	Quantities.			Reported product.	Reported product.
		Bushels.	*Pounds.*	*Gallons.*	*Gallons.*	*Gallons.*
	Amount brought forward from preceding month	49.48	2,622	.....	2,227	.....
1st to 11th	Corn	207.27	11,218	.....	.....	.....
11th to 21st	"	204.43	11,028	.....	.....	.....
21st to 1st	"	178.71	9,632	.....	.....	.....
		.....	.....	.....	25,571	1,139.9
	Total	639.89	34,500	.....	27,808	.....
	Amount on hand	49.93	2,696	.....	2,247	.....
	Total used	589.96	31,804	.....	25,561	.....

Amount of proof-spirits to be accounted for during above period of time	1,139.9	galls.
Amount of proof-spirits reported as above for same period	1,139.9	"
Deficiency		galls.
Eighty per cent. on producing capacity is 24 × 89.28 × 80%	1,714.17	galls.
Amount of spirits reported above as produced	1,139.90	"
Deficiency	574.27	galls.
Assessment is hereby made against L. L. Ferrary for tax on 574.27 gallons proof spirits, at 50 cts. per gallon	287 13	
And $4 per barrel special tax on 42.85 barrels of proof-gallons	171 40	
Total	458 53	
Per-diem tax on distillery, as per survey, of $2 per day for 24 days	48	
Per-diem tax on distillery during suspension of work of $2 per day for days	.....	

Dated at Knoxville, Mch. 14, 1871.

(Signed) GEOR. W. ROSS,
Assessor 2 District, Tenn.

I hereby certify this to be a correct copy of assessment against L. L. Ferrary for Feb., 1871.

(Signed) GEOR. W. ROSS, *Assessor.*

(Indorsed:) (89.) Assessment of spirits against L. L. Ferrary, by G. W. Ross, assessor 2 dist. of Tenn., for the month of February, 1872. Exhibit F.

33 (89) EXHIBIT G.

UNITED STATES INTERNAL REVENUE.

Form of assessment of spirits, based on capacity of distillery.

[If the reported product is less than the amount to be accounted for, as determined by the assessor, or less than 80 per cent. of the capacity, as determined by the survey, an assessment should be made. When the difference between the amount to be accounted for (on the former blanks termed "required product") and the reported product is greater than the difference between the 80 per cent. and the reported product, the assessment will be on the former quantity. When the reported product equals or exceeds the 80 per cent. the assessment will be made upon the difference between the reported product and the amount to be accounted for. If the reported product and the amount to be accounted for are each less than the 80 per cent. the assessment must be made upon the difference between the reported product and the 80 per cent. Particular attention is called to supplement 2, series 4, No. 7. The assessment of the $4-per-barrel tax and the per-diem tax, under section 13, must be made on this form.]

Computation & determination of the quantity of mash or beer fermented and distilled spirits produced in distillery No. 4 of L. L. Ferrary, ascertained from reports dated March 10, 1871, and calculated in compliance with the provisions of section 20, act of July 20, 1868.

Reports.	Materials used for mash or beer.				Mash or beer.	Distilled spirits.
Tri-monthly period.	Description.	Quantities.			Reported product.	Reported product.
		Bushels.	*Pounds.*	*Gallons.*	*Gallons.*	*Gallons.*
	Amount brought forward from preceding month	49. 93	2, 696	.....	3, 247	.....
1st to 11th	Corn	73. 67	3, 972	.....	3, 341	.....
11th to 21st	.....	.....	.....	.....	.....	.....
21st to 1st	.....	.....	.....	.....	.....	271
	Total	123. 60	6, 668	.....	5, 588	.....
	Amount on hand	.....	.....	.....	.....	.....
	Total used	123. 60	6, 668	.....	5, 588	.....

Amount of proof-spirits to be accounted for during above period of time	271	galls.
Amount of proof-spirits reported as above for same period	271	"
Deficiency	.....	galls.
Eighty per cent. on producing capacity is 7 × 89. 28 × 80%	499. 97	galls.
Amount of spirits above reported as produced	271	"
Deficiency	228. 97	galls.
Assessment is hereby made against L. L. Ferrary for tax on 228.97 gallons proof-spirits, at 50 cts. per gallon	114. 48	
And $4 per barrel tax on 12.49 barrels of 40 proof-gallons each	49. 96	
Total	164. 44	
Per-diem tax as per survey of $2 per day for 7 days	14	
Per-diem tax during suspension of work of $2 per day for —— days	.....	

Dated Knoxville, Apr. 24th, 1871.

GEOR. W. ROSS,
Assessor 2 District, Tenn.

I hereby certify this to be a correct copy of assessment against L. L. Ferrary for March, 1871.

GEOR. W. ROSS, *Ass.*

(Indorsed:) (89.) Assessment of spirits against L. L. Ferrary, by G. W. Ross, assessor 2 dist. of Tenn., for the month of March, 1871. Exhibit G.

34 Supreme Court of the United States, of the October term, 1873.

THE UNITED STATES
v.
LEO L. FERRARY, WILLIAM YOUNG CONN Hannum, & John Alexander Dyer.

And now, before the said Supreme Court of the United States, comes the United States, by its attorney, and says that in the record and proceedings aforesaid there is manifest error in this, to wit:

That upon the trial of said cause the district judge presiding in said court instructed said jury "that the law required that if the Commissioner of Internal Revenue was satisfied that the first report of the capacity of said distillery, which was made out and sent to him as above testified to, and of which Exhibit A is a copy, was in any respect incorrect or needed revision, he should direct the assessor to make in like manner another survey of said distillery, the report of which survey must be executed in triplicate and deposited as was required in case of the report of the original survey, and that if the second report of
35 survey, testified to in this case as above stated, and of which Exhibit B B is a copy, was not actually made by the assessor or assistant assessor, and his designated assistant, in like manner with the survey made as the foundation of the report of survey first above mentioned, then that said second report of survey was invalid, and any assessments against said Ferrary based thereon would also be invalid, and the plaintiffs could not recover thereon in this action."

There is also error in this, that the said district judge presiding upon said trial instructing said jury that "if they should be satisfied from the evidence that a second survey had not been made, or that a copy of the same was not furnished to said Ferrary, the distiller, then their verdict must be in favor of the defendants."

There is also error in this, that said district judge presiding at said trial refused to instruct said jury, as requested by the attorney for the United States, "that the first report of survey was valid and binding until the same was abrogated by authority of law; and that was only when defendant was furnished with a copy of resurvey or second survey."

36 There is also error in this, that said district judge upon said trial refused to instruct said jury, as requested by the attorney for the United States, "that if the copy of the second report of survey ordered was furnished defendant—no matter how, so he received it—he would be bound by it; but if he never received it, and continued to operate his distillery under the first one, then he would be bound by the first survey, of which defendant admits having received a copy."

And the said United States pray that the judgment aforesaid may be reversed, annulled, and altogether held for naught, and that it may be restored to all things which it hath lost by reason of the said judgment.

GEO. ANDREWS,
U. S. District Attorney for District of East Tennessee.

37 (Indorsed:) United States v. Leo L. Ferrary, et al. Assignment of errors. Filed August 22, 1874. H. M. Aiken, clk.

38 UNITED STATES OF AMERICA, *ss:*

To Leo L. Ferrary, William Y. Conn Hannum, and John Alexander Dyer, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the office of the clerk of the circuit court of the United States for the district of East Tennessee, wherein the United States is plaintiff, and you are defendants, in error, to shew cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, this 22d day of August, 1874.

CONNALLY F. TRIGG,
District Judge and one of the Judges of the Circuit Court of the United States for the District of East Tennessee.

39 (Indorsed:) Legal service of the within citation acknowledged this 9th day of Sept., 1874. W. P. Washburn, att. for defts.

40 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the district of East Tennessee, greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court before you, between the United States, plaintiff, and Leo L. Ferrary, William Y. Conn Hannum, and John Alexander Dyer, defendants, a manifest error hath happened, to the great damage of the United States, as by its complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgement be therein given, that, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of October
41 next, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the said Supreme Court, the 22nd day of August, A. D. 1874.

[SEAL.] H. M. AIKEN, *Clerk.*

The execution of the within writ is evidenced by the transcript of the record and proceedings in the within-named cause, hereto annexed.

Knoxville, Sept. 14th, 1874.

H. M. AIKEN, *Clerk.*

(Indorsed:) United States v. Leo L. Ferrary et al. Writ of error. Issued Aug. 22, 1874. H. M. Aiken, clk.

42 EASTERN DISTRICT OF TENNESSEE, *ss*:

I, H. M. Aiken, clerk of the United States circuit court for said district, do hereby certify that the foregoing, except the assignment of errors, citation, and writ of error, which are the originals, are full, true, and perfect copies from the records and files of said court, in the cause of The United States of America, plaintiffs, and Leo Leander Ferrary, William Young Conn Hannum, and John Alexander Dyer, defendants.

Given under my hand and the seal of said court, at Knoxville, this 14th day of September, 1874.

[SEAL.] H. M. AIKEN, *Clerk.*

(Indorsement on cover:) No. 250. The United States, plaintiff in error, Leo L. Ferrary, William Y. Conn Hannum, and John Alexander Dyer. E. Tennessee C. C. U. S. Filed 18th September, 1874.

In the Supreme Court of the United States.

OCTOBER TERM, 1876.

THE UNITED STATES
vs.
LEO L. FERRARY ET ALS } No. 54.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TENNESSEE.

Brief for the Plaintiffs.

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BRIEF FOR THE PLAINTIFFS.

STATEMENT OF THE CASE.

The tenth section of the act of July 20, 1868, chapter 186, 15 Stats., 129, under which arise the principal questions to be discussed, is this:

"Immediately after the passage of this act every assessor shall proceed, at the expense of the United States, with the aid of some competent and skilful person, to be designated by the Commissioner of Internal Revenue, to make survey of each distillery registered, or intended to be registered, for the production of spirits in his district, to estimate and determine its true producing capacity, and in like manner shall estimate and determine the capacity of any such distillery as may hereafter be so registered in said district, a written report of which shall be made in triplicate,

signed by the assessor and the person aiding in making the same, one copy of which shall be furnished to the distiller, one retained by the assessor, and the other immediately transmitted to the Commissioner of Internal Revenue. *If the Commissioner of Internal Revenue shall, at any time, be satisfied that such report of the capacity of a distillery is in any respect incorrect, or needs revision, he shall direct the assessor to make, in like manner, another survey of said distillery; the report of said survey shall be executed in triplicate and deposited as hereinbefore provided.*"

In the fall of 1870, Mr. Ferrary, the defendant, proposed to commence distilling whisky at Louisville, Tenn., within the second collection-district of that State. November 10, 1870, an assistant assessor of that district, with an aid designated by the Commissioner of Internal Revenue, agreeably to the requirements of the foregoing section, made the survey therein contemplated; measured the tubs and estimated the true producing capacity of the distillery. Triplicates of the report of this survey were made under the assessor's direction, were signed by him and the skilled aid; one copy retained by him, another sent to the Commissioner of Internal Revenue, and the third furnished to Mr. Ferrary. By this survey and report the producing capacity of this distillery was estimated upon the basis of three gallons of whisky for each bushel of corn, as appears by the copy found in the record, pp. 10, 11.

Upon the eighth day of November, 1870, Mr. Ferrary, as principal, and the other defendants, as sureties, gave the bond now in suit, as required by section 7 of the act aforesaid, (15 Stats., 127,) conditioned as therein prescribed, "in all respects faithfully to comply with all the provisions of law in relation to the business and duties of distillers, and pay all penalties incurred," &c. (Rec-

ord, 13.) The bond recites Ferrary's intention to be engaged in distilling from November 15, but the exceptions state that he did manufacture whisky from December 16, 1870, (the date of the approval of the bond,) to March 10, 1871. November 18, 1870, the Commissioner of Internal Revenue sent the letter, found on page 11 of the record, saying that the report of survey, dated November 10, 1870, "is regarded as erroneous *in respect to the dry inches and the yield of spirit to the bushel.* According to the ruling of this office, three dry inches for rye and seven for corn are the true allowances for tubs 60 inches or under in depth;" adding, that if the distillation was "by direct steam," (as it was,) "the yield should be 3½ gallons to the bushel." (Record, 11.) The assessor was accordingly ordered to make another survey, as provided in section 10 above quoted, and the letter concluded, "*as no new measurements are required*," no expense was to be allowed. (Record, 12.) The second report thus demanded was made November 22, 1870, with the desired amendments, fixing the producing capacity at 3½ gallons per bushel. (Record, 12, 13.) In making this "new estimate and determination of the producing capacity," the officers "did not again visit the distillery nor make any new measurements" of any part thereof, but gave all the old measurements of the former report. (Record, 8.) Triplicate copies of this last report were made; one retained by the assessor, and one sent to the Commissioner. The assessor's clerk swore to having either mailed or delivered the third copy to Mr. Ferrary, and *other evidence was introduced tending to show that it reached him;* but that gentleman denied its reception and that he had any knowledge of it till about the time he closed his distillery, in March, 1871. His mail-clerk

and other employés testified in a manner tending to negative its delivery at the distillery.

Assessments were made for December, 1870, January, February, and March, 1871, based upon the estimates of the second report of survey; "*but had they been based upon the first report of survey, there would still have been a deficiency, for which Ferrary would be liable to be assessed.*" (Record, 9.) After instructions not excepted to, the presiding judge told the jury that if the second report of survey was not actually made by the assessor, or assistant assessor, and his designated assistant, in like manner with the survey which was the foundation of the first report, then said second report of survey was invalid, and any assessments based thereon would also be invalid, and the plaintiff could not recover thereon in this action; to which instruction exception was taken, (Record, 9, 10,) as well as to this one, viz: "*If they should be satisfied from the evidence that a second survey had not been made, or that a second copy of the same was not furnished Ferrary, then their verdict must be for the defendants.*" (*Id.*) The Government asked the judge to instruct the jury—"1st. That the first report of survey was valid and binding until the same was abrogated by authority of law, and that was only when defendant was furnished with a copy of resurvey or second survey;" and "2d. That if the copy of the second survey ordered was furnished defendant, he would be bound by it; but if he never received it, and continued to operate his distillery under the first one, then he would be bound by the first survey, of which he admits having received a copy." These instructions were refused upon the ground that no assessment was based on the first survey, and exception was taken. This statement of facts

is condensed from the exceptions and the accompanying exhibits. (Record, 8–18.)

The defendants obtained a verdict.

ASSIGNMENT OF ERRORS.

The plaintiffs assign for error—

1st. The foregoing instructions and refusals to instruct to which exceptions were taken.

2d. The instruction "that if the second report of survey testified to in this case, as above stated, and of which exhibit B B is a copy, was not actually made by the assessor or assistant assessor and his designated assistant, in like manner with the survey made as the foundation of the report of survey first above mentioned, then that said second report of survey was invalid, and any assessments against said Ferrary based thereon would also be invalid, and the plaintiffs could not recover thereon in this action." (Record, 9, 10; folio 22.)

3d. The instruction to the jury, "that if they should be satisfied from the evidence that a second survey had not been made, or that a copy of the same was not furnished to said Ferrary, the distiller, then their verdict must be in favor of the defendants." (Record, 10; folio 23.)

4th. The refusal to instruct, as requested, "that the first report of survey was valid and binding until the same was abrogated by authority of law, and that was only when defendant was furnished with a copy of survey or resurvey." (Record, 10; folio 23.)

5th. The refusal to give this requested instruction: "That if the copy of the second report of survey ordered was furnished defendant—no matter how, so he received

it—he would be bound by it; but if he never received it, and continued to operate his distillery under the first one, then he would be bound by the first survey, of which he admits having received a copy."

BRIEF.

I.

All the instructions and refusals to instruct rest upon two erroneous assumptions, viz: 1st. That where the figures and measurements of a survey are entirely correct, but there is a clerical mistake, or one in computation, or a wrong inference from these correct figures and measurements, apparent upon the face of the report, and requiring no new examination or measurements for its correction, a second visit to the distillery was necessary to authorize the collection of *any* tax, or (rather) the maintenance of a suit upon the distiller's bond; and, 2d. That any assessment by the assessor of internal revenue was an essential prerequisite to a recovery upon this bond.

That these positions were legally wrong will, we hope, be made to appear in the following discussion of the instructions and refusals to instruct which were the ground of exception, considered *seriatim* in the order in which they are placed in the record.

II.

An examination of the bill of exceptions (Record, folios 18 to 23) shows that the jury were to understand that, unless a second visit was made to the distillery, no tax could be lawfully assessed upon Mr. Ferrary on the basis of the second report, and that this action could

not be maintained. The instruction—substantially to this effect—(Record, folio 22) must be considered with reference to the facts upon which it was based. The law under discussion must likewise be construed with reference to the purpose to be accomplished—to the *use* to be made of the facts it required to be ascertained in the manner designated.

The intent of the law was to ascertain the producing capacity of every distillery; the survey and measurements were to accomplish this intention; to serve as a basis for an "estimate and determination" of such capacity. This is arrived at by a survey of the building, machinery, and appliances used in the manufacture; by measuring the tubs, &c., especially the fermenting tubs, since there will be no use in mashing more than can be fermented. The actual product of the distillery cannot be known in advance, nor is it material; it is its capability of production that is to be estimated and determined. (Collector *v.* Beggs, 17 Wall., 190; Pahlman *v.* Collector, 20 Wall., 200.)

In the "Regulations and instructions concerning the tax on distilled spirits, under act of July 20, 1868," &c., being Series VI, No. 7, of the United States Internal-Revenue Instructions, &c., page 11, it is said: "In order to estimate and determine 'the true producing capacity' of a distillery, it is necessary to ascertain the capacity of the mash and fermenting tubs. This should be done by actual and careful measurement, and the report must show the greatest diameter, least diameter, and depth of each tub; its form, whether round, oval, or square; the number of dry inches allowed for working or fermenting; its working capacity—the fermenting-tubs, in gallons; the mash-tubs, in bushels, estimating not less than

one bushel to twenty-five gallons of mash." The rule by which the capacity of the fermenting-tubs is to be ascertained is then given upon the top of the next page, (12,) and is followed by a statement of the process of arriving at the quantity of grain that can be daily mashed and fermented. It then proceeds, (page 14:) "Having thus found the number of bushels which can be mashed and fermented in twenty-four hours, the next point to be determined is, what quantity of spirits can, under all the circumstances, be produced from a bushel of grain." * * * "In all cases where the estimate is below the average, (3½ gallons,) *an explanation will be required.* Having determined this product, multiply the number of bushels that *can* be fermented in twenty-four hours by it, and the result will be the quantity of spirits that *can* be produced in twenty-four hours." At the top of page 15 it says: "The number of dry inches to be allowed for fermentation is also a subject for the discretion of the assessor and his assistant;" but proceeds to give the results of experience by which that discretion must be guided, and, to a certain extent, controlled.

These citations have been made because they are the expressions of those possessing authority and skill in regard to this subject-matter, though the facts stated are so obvious and elementary as to be brought within judicial cognizance without express proof.

The application of this is to show that the purpose of the Acting Commissioner, in directing a decrease of the *discretionary* allowance for dry inches and an increase of the *estimated* quantity of whisky to be produced from a bushel of grain, was to control the *discretion* of his subordinates, and not to change any of those elements which were to be discovered by actual inspection of the distillery and measurements made therein.

The *survey* was correct and needed no revision; only the *estimate and determination*, which were deductions from the facts and figures of the survey, were erroneous—incorrect conclusions from correct premises. The phraseology employed by Congress in this enactment, and by this court in reference to it, recognizes this distinction between the survey itself and the estimate and determination based upon it. "Every assessor shall proceed * * with the aid of some competent and skillful person * * to make survey of each distillery, * * to estimate and determine its true producing capacity," &c., &c. (15 Stats., 129, § 10; U. S. *v.* Singer, 15 Wall., 120.) "The tenth section directed a survey of every distillery registered, or intended to be registered, for the production of spirits, *in order to estimate and determine its true producing capacity.* This survey was required to be made by the assessor of the collection district, with the aid of some competent and skillful person, to be designated by the Commissioner of Internal Revenue. The mode in which the producing capacity of the distillery was to be ascertained, as prescribed by the regulations of the Commissioner, was by measuring each mash or fermenting tub; by calculating how many bushels of grain, when mashed, (if grain was used,) the fermenters would hold; by considering the period of fermentation, and deducing therefrom the number of bushels which could be fermented in twenty-four hours. This ascertained, the assessor and his assistant were directed to estimate the quantity of spirits that could be produced in the distillery from a bushel of grain, and multiplying that by the number of bushels that could be fermented therein in twenty-four hours, the producing capacity of the distillery was to be ascer-

tained and fixed as a standard of taxation, or rather to determine the minimum of taxation." (Collector *v.* Beggs, 17 Wall., 189; Pahlman *v.* Collector, 20 Wall., 197.) The statute must mean that only that which the Commissioner was satisfied was incorrect and needed revision should be revised and corrected. The will of the legislature is the law. We should be slow to attribute to Congress a will apparently so capricious and arbitrary as would be implied in declaring that it required a simple error in computation, or an erroneous deduction from correct figures, to be corrected only after a ride of scores, and perhaps hundreds, of miles to the distillery, over the mountains of Tennessee, there to go through the ceremony of remeasuring and surveying tubs and premises the exact dimensions and situation of which were already known. If the figures of the report showed that the product of two multiplied by three had been accidentally carried out as eight instead of six, must this journey and ceremony be repeated? *Lex nil fustra facit. Lex nemimen cogit ad vana seu inutilia.* But if the legislature did not intend this result, then the law does not, for their intention is the law; and any such judicial construction as that of the district judge in this case, which does require it, is erroneous. *Benignius leges interpretandæ sunt, quo voluntas earum conserveter.*

III.

The next instruction reported is, that if the jury was satisfied that no second survey was made, or that a copy thereof was not furnished Ferrary, their verdict must be for the defendants.

This obviously means *such* a survey as the judge had before told them the law required, viz, a second visit to

the distillery, which confessedly never was made. It was equivalent to a direction to find for the defendants.

The language used by defendants' counsel, in concluding the third complete paragraph upon page 3 of his brief, viz, "And whether the jury should have found the second survey to have been made or not, the proof *clearly showing* that no copy thereof had ever been delivered to Ferrary, their verdict must have been the same," is not warranted by the case presented upon the record. The bill of exceptions (p. 8, folio 19) expressly states the fact that there was no second visit to the distillery and no new measurements; while upon the next page (folio 20) it appears that there was the testimony of the clerk, White, to the delivery of the second report, "and other evidence" (the nature and volume of which is not stated) "tending to prove that said report was actually received by said Ferrary." Ferrary denied its reception, and an unknown number of his employés were called, whose testimony *tended* to support his denial. The fact that there was no second actual, visual survey was undenied; the delivery of the second report was a debatable point; yet the jury were told that if *either* of these things was omitted the action was defeated.

The instruction was wrong for (at least) three reasons:

1. It required the jury to be satisfied of a second actual visit to the distillery. This has been sufficiently discussed.

2. The language of the section (§ 10) referred to is directory and not mandatory. At least, a distiller who has gone on for months manufacturing whisky cannot escape all taxation because an assessor has not implicitly followed its directions. The first section of this act of

July 20, 1868, c. 186, (15 Stats., 125,) declares that there shall be collected and levied a tax of 50 cents on every proof-gallon of all distilled spirits. Subsequent sections direct the method of laying and collecting this tax. Section 10 directs the mode of procedure for determining the number of gallons that any particular distillery can produce; which quantity is that for which its proprietor is to be assessed; but a departure from the prescribed *modus operandi* does not exempt him from taxation. In short, the provisions of this section are not to be taken as conditions-precedent; especially where the suit is upon his bond and not directly upon the assessment.

Though a statute direct an assessment to be made before a public improvement, for which the tax is imposed, is begun, this is only directory, and one laid afterward is valid. Doughty *v.* Hope, 3 Denio, 249, 252, and cases there cited, which say that a failure to take a vote by ayes and noes, to publish the resolution to lay the tax, &c., &c., as required by statutes, do not invalidate the assessment. So, statutes regulating the manner in which officers shall conduct elections are held directory. (People *v.* Cook, 8 N. Y., (4 Seld.) 89, and cases there cited.)

The distiller is bound to know the law, and must know what the producing capacity of his distillery is, whether run to its fullest extent or not; and cannot be greatly injured by being held to an absolute liability to 80 per cent. of this capacity, whether he has received the copy of report or not. He has to make tri-monthly returns of his actual production. He *knows* absolutely whether or not he has received the copy to which the law entitles him; the assessor, unless he deliver it per-

sonally, cannot know; therefore the distiller should be held to apply for that which would be furnished him upon application, rather than that he should escape all liability by reason of a failure of the mail, or the remissness of the messenger, by which or whom the report is transmitted in fulfillment of the provisions of this section.

3. The judge erred in resting the maintenance of the action entirely upon the making and delivery of the second survey and report of survey, &c.

In the plaintiffs' replication, (Record, 5,) the breach of the defendants' bond is declared to be that there was lawfully assessed against him certain *taxes, to wit*, to a specified amount. The essential allegation is the existence of certain unpaid taxes outstanding against him; their amount it is not necessary to allege, and it is stated under a *videlicet*. If the delivery of a report is a condition-precedent to any liability, Mr. Ferrary had that. The only effect of giving him the first and omitting to deliver the second must be to make the first operate by way of estoppel, and to render it the basis of assessment. What that assessment *must be* per gallon was fixed by the first section of this act of July 20, 1868, viz, 50 cents per gallon. The productive capacity being thus fixed and determined as between these parties by the first report, the rest is mere mechanical work, or the result of simple multiplication. For instance, counsel says (defendant's brief, p. 2, line 8,) that the difference in producing capacity between the two reports was forty-two gallons per day, which is approximately correct, *provided none of the tubs were sealed*. It would be a fraction more than that for corn and a fraction less for rye. Compare the reports. (Record, pp. 11 and 13.) Then the

distiller knew that, using corn, as he did, (Record, 15,) for the twelve working-days between the time he commenced business and the succeeding New Year's day, he was liable for 150 gallons (daily producing capacity—tubs 1, 2, 3, and 4 being sealed up under § 30) × 12 = 1,800 gallons, which he *could* have produced with the unsealed tubs. He returned but 297.86 gallons, (Record, 15,) although he ran every working-day (and excluding Sundays, § 35, and Christmas) between the 16th December, 1870, and January 1, 1871. He was, therefore, liable for at least 80 per cent. of 1,800 gallons = 1,440 gallons, at 50 cents per gallon, making $720, which he should have paid upon the basis of the first report. *The per diem tax of $4 a day* (§ 13) *was due irrespective of the difference in the two reports of producing capacity*, since there was a daily capacity of more than forty and less than sixty bushels of corn upon the basis of the figures of either report. (9 Int. Rev. Record, 6.) Here was a special, independent tax, correctly assessed; yet the jury were told it could not be recovered, if there was no second survey, or no delivery of the second report, for the alleged reason that there was no assessment to discover the defendant's liability under the first survey, (Record, 10, folio 24;) yet it was ascertained to be just $48 under that first report. This instruction was palpably erroneous. The correct assessment (under the first report of survey) for January, February, and March, 1871, could also easily be computed from the figures in the Record. *Id certum est, etc.*

In 1870–'71 distillers were subject to *four* different, independent assessments, one of which might be correctly made and collectible, while another would be erroneously assessed and uncollectible. These were:

(1) the special tax, at the rate of $400 *per annum*, irrespective of quantity manufactured less than a hundred barrels, (15 Stats., 150, § 59;) (2) the "barrel-tax," of $4 a barrel on every barrel in excess of a hundred, (*Ib.;*) (3) the *per diem* tax upon the capacity for the daily consumption of grain, (15 Stats., 130, § 13; and (4) the tax upon actual production, or upon 80 per cent. of producing capacity, whichever indicated the larger quantity, (15 Stats., 132–3, §§ 19 and 20.) In the assessments stated in the record, *and in each of them*, the *per diem* tax is correctly stated upon the basis of either report; and they also furnish the data for the correct statement of the other three taxes upon the basis of the first report.

IV.

We come now to my second proposition, viz, that *no other assessment than that made by the statute itself is necessary* to the maintenance of suit upon this bond, even if it were otherwise as to an action brought to recover an assessment laid by an assessor. This is so held in Dollar Savings Bank *v.* United States, 19 Wallace, 240; followed in United States *v.* Hazard, just decided in Rhode Island; and I notice the case of United States *v.* Halloran, reported in to-day's (October 4, 1876) supplement to the New York Times, proceeds upon this theory. This last was a suit upon a distiller's bond, to recover an unpaid balance of a tax laid under § 20, one upon the actual production, under § 19, having been previously assessed and paid. Judge Shipman is reported to have held that, "as the statute designates the rate of tax, an assessment is not necessary to entitle the Government to recover it in an action upon the distiller's bond."

V.

This is a suit upon a bond given in Tennessee. Under the code of that State, "§ 2746, All contracts may be sued on in the same form of action." Chapter 9, title 1, Part III, of that code, "§ 2893," says: "Profert shall be required as heretofore;" *i. e.*, in the declaration. (See act of 1819, c. 27, § 2;) and "§ 2898" provides that "In actions upon penal bonds or other writings, for the non-performance of any covenant or agreement contained therein, the plaintiff may assign as many breaches as he may deem proper; and verdict and judgment may be rendered on such of the breaches as he may prove." The form of declaration is given on page 1253, § 2939, and the note added says that, the bond being set out and the breach assigned in the declaration, "the plea in substance is, that the plaintiff has not been damnified in manner and form as alleged, concluding to the country," citing Smith *v.* Eubanks, 9 Yerger, 20, 23. Section "2913" of this code says: "The defendant may enter a general denial of the plaintiff's cause of action, equivalent to the general issue heretofore in use;" and the next section permits him to plead it in cases where formerly it would not have been good, and § 2917 allows parties to plead as was customary prior to the code. The provisions of the bond are truly recited in the declaration, "the breaches assigned in the declaration precisely negative the conditions of the bond, and are therefore sufficient and in proper form." (State *v.* Witherspoon, 9 Humph., 398.) The defendants plead performance. This made up the issue; and, since the statute defined the distiller's duties, and specifically the taxes imposed upon him, if the further pleadings presented any different issue it was an immaterial one; and

if the verdict could be construed as a finding only upon the tax assessed under the second survey, and this was invalid, yet if, under the assessment of the statute, a tax is plainly due, the United States are entitled to a judgment, notwithstanding the verdict.

But the replication simply avers a liability for taxes generally, stating their aggregate sum under a *videlicet*, and the rejoinder avers that "*no* taxes" were "legally assessed." If we have succeeded in showing that, either by the statute or the assessor, there were *any* taxes legally assessed which the instructions of the court took from the consideration of the jury, then the cause must be remanded.

EDWIN B. SMITH,
Assistant Attorney-General.

BRIEF FOR DEFENDANTS.

SUPREME COURT OF THE UNITED STATES.

No. 250.

THE UNITED STATES, PLAINTIFFS IN ERROR,

vs.

LEO L. FERRARY, WILLIAM Y. CONN HANNUM, AND JOHN ALEXANDER DYER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TENNESSEE.

H. BARRY, PRINTER—KNOXVILLE.

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TENNESSEE.

The United States brought suit against Leo L. Ferrary and his sureties upon a distiller's bond, dated Nov. 8, 1870, the sureties qualified by making affidavit thereto 28th Nov., 1870, and the bond approved by the assessor Dec. 16th, 1870. As the record shows, on the 10th of November, 1870, the assistant assessor, together with a designated assistant, made survey and estimate of Ferrary's distillery, which on the same day was made out in writing in triplicate—one copy furnished said Ferrary, one copy transmitted to the Commissioner of Internal Revenue, and the other copy retained by the Assessor. On the 18th of November, 1870, acting Commissioner Douglass addressed the assessor a letter calling his attention to an error in said report "in respect to the dry inches and the yield of spirits to the bushel," and adds "you are ordered, as provided in section 10, act of July 20, 1868, to make another survey of this distillery."

On the 22d day of November, and the same day said letter was received without any new measurements being made in the office of the Assessor, another survey is claimed to have been made. It does not appear that a copy of this last survey was ever furnished the distiller. By the first survey, and report, the producing capacity of said distillery was estimated and determined upon the basis of three gallons of whiskey for each bushel of corn used. By the last survey the basis was three and one half gallons to the bushel—a difference in producing capacity of about forty-two gallons per day. The distiller was assessed *alone* on the basis of the report of survey last made. It does not appear but what Ferrary has paid for all the spirits *actually* produced.

How much would still be owing on the basis of the first report of survey *is not shown*, as no assessment was ever made thereunder.

The deficiency tax on the basis of the last report of survey will amount to about $2,100, as shown by the assessments.

Thus it appears that the purpose of this suit is to recover 80 per centum of the producing capacity of this distillery, as estimated under the provisions of the Act of July 20, 1868, based on said second report of survey.

There are four errors assigned—two arising upon the charge as given by the court to the jury, and two for refusing to charge as requested by plaintiffs below.

We will take them in the order stated in the record. The error first assigned, is upon the following charge: 'That the law required that if the Commissioner of Internal Revenue was satisfied that the first report of the capacity of said distillery, which was made out and sent to him as above testified to, and of which Exhibit A is a copy, was in any respect incorrect or needed revision, he should direct the Assessor to make in like manner another survey of said distillery, the report of which survey must be executed in triplicate and deposited as was required in case of the report of the original survey, and that if the second report of survey, testified to in this case as above stated, and of which Exhibit B B is a copy, was not actually made by the Assessor or Assistant Assessor, and his designated Assistant, in like manner with the survey made as the foundation of the report of survey first above mentioned,

then that said second report of survey was invalid, and any assessments against said Ferrary based thereon would also be invalid, and the plaintiffs could not recover thereon in this action."

This charge follows the language of the law itself (Sec. 10, Act July 20th, 1868), merely adding in substance, that if this provision of law had not been complied with, the Assessor could base no assessment thereon. Said Section, after specifying the manner of making the original survey, which, it is admitted, requires the *actual* survey of the distillery, then provides: "If the Commissioner of Internal Revenue shall, at any time, be satisfied that such report of the capacity of a distillery is in any respect incorrect or needs revision, he shall direct the Assessor to make, *in like manner, another survey of said distillery.*" This statute, therefore, in express terms, not only commands an act to be done, but prescribes the manner in which it shall be done, as well as the party by whom to be done, and can not, therefore, be said to be merely directory, but an *essential condition* to a right of recovery.

The second error is assigned upon the following charge: "If they should be satisfied from the evidence that a second survey had not been made, or that a copy of the same was not furnished to said Ferrary, the distiller, then their verdict must be in favor of the defendants."

This charge embraces the first, and something more. It has been held by this court, in the case of *Peabody, Collector*, vs. *Stark*, 16 Wall., 240, and re-affirmed in the case of *Pahlman* vs. *The Collector*, 20 Wall., 189, that under the 80 per cent. clause in the 20th section of the Act of July 20th, 1868, the distiller is not liable until a copy of the survey, *in which the tax is assessed*, has been delivered to him as provided in section 10 of said Act. As applied to this case, the tax was assessed *alone* under the second survey; and whether the jury should have found the second survey to have been made or not, the proof clearly showing that no copy thereof had ever been delivered to Ferrary, their verdict must have been the same.

We must look to the entire charge to gather the force and effect of this part. The plaintiffs, it must be remembered, based their entire case upon the fact that the first report of survey had been done away

with by the Commissioner, under the revisory power given him by the statute. and that a second survey had been properly made and delivered. Without this, the Assessor would have been acting in direct opposition to the instructions which provide "that assessments *must*, therefore, be made upon the basis of the survey last delivered to the distiller, &c." (For copy of instructions, see 16th Wall., 242.)

If plaintiff's theory, therefore, was that there was left, if any, only the second report of survey, the charge of the court first, that if said second report of survey was made, and a copy thereof furnished the defendant, Ferrary, then that said Ferrary would be estopped in this action to deny the validity of the assessments made thereon—but, otherwise, that plaintiff's could not recover—is not objectionable.

Again, the court will observe that the bond was not finally executed and not approved until after the first report of survey had been disregarded and a new one directed by the Commissioner of Internal Revenue. The distiller could not proceed until his bond was approved. By regulations of the Commissioner, dated April 22, 1869, the Assessor was directed to withhold this approval until notified that the distillery warehouse has been established and a store-keeper assigned. Section 17 of said Act prohibits such approval until all the requirements of the law have been complied with, while section 22 provides "that on the third day after such approval, the distiller shall be deemed to have commenced, &c." In view of these provisions, it may well be insisted that the first report of survey never had any valid and binding force, and especially so far as the sureties are concerned.

The third error is assigned upon the refusal of the court to charge the jury, "That the first report of survey was valid and binding until the same was abrogated by authority of law; and that was only when defendant was furnished with a copy of re-survey or second survey."

This was properly refused, not only for the reason then assigned by the Circuit Judge (see page 10 of Record), but because to have given it would be to restrict the power of the Commissioner and to make his revisory power wholly dependent upon the act of the Assessor or some third person, as well as thereby to fix the time when such action shall become

effectual. Whatever might have been the defendants' liability, had their bond been approved and the distillery been operated under the first report of survey, before the Commissioner had exercised his power of setting it aside in case they had been assessed thereunder, yet under the facts of this case it is insisted that this request of charge was properly refused.

The court also refused to charge the jury, "That if the copy of the second report of survey ordered was furnished defendant—no matter how, so he received it—he would be bound by it; but if he never received it, and continued to operate his distillery under the first one, then he would be bound by the first survey, of which defendant admits having received a copy," and this is assigned as the fourth error.

This request of charge embraces two propositions, and if either is untenable, both must fall. If we are right in what we have stated above, then, first, the defendants were never bound by the first report of survey; secondly, no assessments had been made, based on said report of survey; and, thirdly, the plaintiffs themselves were claiming in opposition to said survey, and had sought no liability based thereon. If, as the court charged (see page 10 of Record), an assessment made upon a valid survey, properly furnished, is so far a binding act that the distiller is estopped to deny its validity, it follows that without such assessment being made, the government is not in a position to claim any liability.

Suppose this second request had been given in charge to the jury, as requested, how could it have benefitted the plaintiffs below? Since, even if an assessment is not a necessary pre-requisite in such case, yet the proof not showing *how much* of a deficiency there was upon the basis of the first report of survey, no judgement could have been rendered in plaintiff's favor.

Defendants, therefore, insist that the verdict of the jury was well sustained by the facts and the law as applicable thereto.

E. C. CAMP,

Attorney for Defendants.

In the Supreme Court of the United States.

OCTOBER TERM, 1876.

UNITED STATES
vs.
LEO L. FERRARY ET ALS. } No. 54.

ERROR TO THE CIRCUIT COURT, EASTERN DISTRICT OF TENNESSEE.

Memorandum of Computation.

In the Supreme Court of the United States.

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ERROR TO THE CIRCUIT COURT, EASTERN DISTRICT OF TENNESSEE.

MEMORANDUM OF COMPUTATION.

The following computation, suggested at the oral argument, is now submitted in print, by leave of court, in order to show that facts and figures were before the jury and are of record to establish precisely the sum due as taxes from Mr. Ferrary upon the basis of the *first* report of survey, of which he admits he had a copy; and that the refusal of the judge to instruct, as requested, (record, 10, folio 23,) that if Ferrary, never having received a copy of the second report, "continued to operate his distillery under the first one, then he would be bound by the first survey," and the reason alleged for this refusal, viz, that there was never any assessment upon the basis of the first survey, were

legally erroneous. By each assessment made (record, pp. 15–18) it appears that "*corn*" was used at this distillery. In the assessment for December, 1870, (found on page 15,) based upon the *second* report of survey, the daily spirit-producing capacity is put at 177.48 gallons. From this it is apparent that tubs 1, 2, 3, and 4 were sealed up and not in use, because that report of survey put the daily capacity from corn at 296.38 gallons, and the statute permits no other possible way of reducing producing capacity than the sealing up of tubs, (15 Stats., 138–'9, sec. 30.) That these four tubs were sealed can be demonstrated. Taking as our basis of calculation the figures of the second report of survey, we find the "working capacity for corn" of all the ten tubs to aggregate 11,432 gallons, (record, 12, folio 28,) and the spirit-producing capacity of the distillery to be "296.38 gallons from corn," (record, top of page 13.) If we deduct from these 11,432 gallons the capacity of the first four tubs, (4,586 gallons,) we find the remaining six tubs to have a capacity of 6,846 gallons. If all the ten tubs, or 11,432 gallons, produced 296.38 gallons of spirit daily, what would the six tubs, or 6,846 gallons, produce? 11,432 : 296.38 :: 6,846 : 177.48.

Thus we have proved that four tubs were sealed. But the assessment, at the rate of 177.48 per day, was, under second survey, at the rate of 3½ gallons to the bushel. It is a simple matter, however, to show *precisely* what it was by the first report of survey. That gave the total "working capacity for corn" of all the tubs as 11,336 gallons, and the spirit-producing capacity as 251.91. Again, deducting the capacity of the first four tubs, (4,586 gallons,) we find the other six tubs to have a capacity of 6,750 gallons. If all the tubs have a spirit-

producing capacity of 251.91 gallons, what is the spirit capacity of Nos. 5 to 10, inclusive? It is thus stated mathematically: 11,336 : 251.91 : : 6,750 : 149.9973, (say 150 gallons per day). Deducting Christmas, and all the Sundays between December 16, 1870, when Mr. Ferrary began operations, and January 1, 1871, there are twelve working days, which we find he was assessed for. (Record, 15.) A distiller is liable for every working day, unless he suspends upon notice, as provided in 15 Stats., (134, § 22. Sundays he is forbidden to run. (*Id.*, 140, § 35.) Producing 150 gallons a day for twelve days made a gross product of 1,800 gallons. He reported and paid the tax upon 297.86 gallons. (Record, 15.) Deducting this, which we accidentally omitted to do in our brief, (p. 14,) we have his capacity to produce, in excess of his return, 1,502.14 gallons. He was assessable for 80 per cent. of this last quantity, $1,502.14 \times 80\% = 1,201.71$ gallons, assessable at 50 cents a gallon = $600.85. Thus we have his tax upon producing capacity for December, 1870, upon the basis of the first report of survey, exactly, to a cent.

But, as remarked in my brief, there were four distinct taxes imposed by statute upon distillers. The license tax was at the rate of $400 per annum, (15 Stats., 150, § 59.) This paid a tax of $4 a barrel on a hundred barrels produced within the year. An additional tax of $4 a barrel was imposed on every barrel produced in excess of a hundred. (*Id.*) For five months, from December, 1870, up *to* May, 1871, Mr. Ferrary had to pay a *pro-rata* tax of $166.67, being $\frac{5}{12}$ of $400. This paid the tax on little over forty-*one* barrels. Upon the basis of the second report of survey his producing *capacity* of 1703 gallons (Record, 15) gave little over forty-*two* barrels of

forty gallons each. $1703 \div 40 = 42.6$ barrels; therefore he was assessed for the 1.29 barrels in excess of the number upon which his prepayment of $166.67 paid the $4 a barrel tax. But, on the basis of the *first* report of survey, the producing capacity of 1,440 gallons, (as above ascertained,) *i. e.*, 1800×80 per cent., would be *less* than forty barrels of forty gallons each, (to wit, only 36 barrels,) and so no *barrel* tax was due in December, 1870.

By § 13 of the stat. of July 20, 1868—(15 Stats., 130)—there was also imposed a *monthly* tax upon "every authorized distiller whose aggregate *capacity for mashing or fermenting* twenty bushels of grain or less in twenty-four hours, a tax of $2 a day, Sundays excepted; and a tax of $2 per day for every twenty bushels of grain of said capacity in excess of twenty bushels of grain in twenty-four hours. But any distiller who shall suspend work, as provided by this act, shall pay only $2 a day during the time the work shall be so suspended in his distillery."

This tax was imposed upon every complete twenty bushels, using that quantity as a unit and disregarding fractions; so that either twenty or thirty bushels a day paid a $2 tax, and fifty bushels a day paid $4 a day, the same as was exacted for a consumption of but forty bushels. (See 9 Int. Rev. Record, 6.) Under the first report of survey, (Record, 11,) the ten tubs of 11,336 gallons capacity consumed daily 83.97 bushels of corn. Then the six unsealed tubs, with a capacity of 6,750 gallons, would consume exactly fifty bushels a day and subject the distiller to the tax of $2 a day for each working day. $11,336 : 83.97 :: 6,750 : 50$.

Upon the basis of the *second* report of survey (Record,

12) the daily consumption was 84.68 bushels of corn, with all the ten tubs, of 11,432 gallons capacity. Then the six unsealed tubs, with their 6,846 gallons, would require only about fifty and three-quarter bushels, (50.71,) so that the *per-diem* tax would be the same under either report. 11,432: 84.68:: 6,846: 50.71.

Thus we see that the report itself, whichever was legally valid and binding upon the parties, gave all the needed elements of correct assessment, requiring only the use of paper and pencil a few moments in the jury-room. Ferrary's proper assessment for December, 1870, was

"On 80 per cent. of producing capacity, less amount by him reported and paid for, 1201.71 gallons @ 50c =	$600.85
Per diem of $4 a day for twelve days =	48.00
Total tax due for December, '70	648.85

By the same simple process we can easily fix the correct tax for the succeeding months that Mr. Ferrary operated his distillery. For January, 1871, it is thus ascertained: According to the assessment on page 16 of Record, the six unsealed tubs were run their full capacity (of 177.48 gallons, as per second report, or 150 gallons by first report) for seven days, making 1,050 gallons. Eighty per cent. of this quantity would be 840 gallons. It is, then, evident that the producing capacity of the distillery was further reduced by sealing tubs 5, 6, and 7. The daily capacity of tubs 8, 9, and 10 (*i. e.*, "working capacity for corn") by *first* report was 3,444 gallons, (Record, 11,) giving 76.53⅓ gallons of spirit a day, instead of 89.28 gallons, as fixed on the basis of the *second* report. (Record,

16, where the figures are erroneously divided thus, 892.8, instead of 89.28.) The distillery ran these three tubs fourteen days in January, 1871, making $76.53\frac{1}{3} \times 14 = 1{,}071.46$ gallons of spirit. Of this, 80 per cent. would be $1{,}071.46 \times 80 = 857.16$ gallons. The total producing capacity for January, then, was $840\,8 + 57.16 = 1{,}697.16$ gallons. Ferrary reported and paid for 1,117.94 gallons that month. Subtract this, $1{,}697.16 - 1{,}117.94$, and we have 517.22 gallons, on which he was liable to pay 50 cents a gallon, fixing his tax on producing capacity for January, 1871, at $258.61 precisely. That tubs 5, 6, and 7 *were* sealed is demonstrated as before, viz, by positive requirement of statute that the producing capacity shall be reduced in no other way, and by stating the proposition that if the ten tubs gave 296.38 gallons, (under *second* report—Record, 13, top,) the last three would give 89.28 gallons, at which assessment was made. (Record, 16.) Then, on basis of *first* report, if all ten tubs yielded 251.91 gallons, (Record, 11,) the last three would give $76.53\frac{1}{3}$ gallons.

The barrel-tax is thus ascertained. Before beginning to run he paid $166.67, being tax on 41.67 barrels at $4 per barrel. In December, 1870, he made but thirty-six barrels, leaving the tax paid in advance on 5.67 barrels more. In January, 1871, 80 per cent. of producing capacity was (as we found above) 1,697.16 gallons, or 42.429 barrels of 40 gallons each. Take out the 5.67 barrels already paid for, and we have 36.76 barrels on which a tax of $4 a barrel was due, making the barrel-tax for January, 1871, just $147.04.

We have already seen that tubs 5 to 10, inclusive, could consume 50 bushels of corn daily, fixing the *per-diem* tax at $4 a day. These were run seven days in

January, 1871, (Record, 16,) making due for that time $28 on this score. The tubs 8, 9, and 10 were run fourteen days, capable of using 25.59+ bushels of corn a day; for if all the tubs, holding 11,336 gallons, would use 83.97 bushels, the three last, holding 3,444 gallons, would use 25.59 bushels. 11,336 : 83.97 :: 3,444 : 25.59. Being but a few bushels over twenty, the *per-diem* tax for these fourteen days was $2 a day, or $28. It was the same while work was suspended two days. Thus we have the whole taxes for January, 1871, *assessed under distinct sections of the law*, as follows:

On 80 per cent. of *producing capacity*, in excess of the reported and tax-paid production....	$258 61
Barrel-tax on 36.76 barrels, at $4	147 04
Per-diem tax, 7×4=28, and 16×2=32.....	60 00
Making the total tax for January, 1871	465 65

upon the figures of the *first* report of survey.

In February, 1871, he ran tubs 8, 9, and 10, by which he *could* have made 76.53⅓ gallons of spirit daily (as above shown) twenty-four days, giving a producing capacity of 1,836.8 gallons. He reported and paid tax on but 1,139.90 gallons. (Record, 17.) Eighty per cent. of his producing capacity was 1,469.44 gallons. Deduct his reported and tax-paid product and we have 329.54 gallons on which he was liable at 50 cents a gallon. So his tax on producing capacity for February, 1871, was $164.77. His 1,469.44 gallons would make 36.74 barrels of 40 gallons each. A tax of $4 per barrel would be $146.94, and his *per-diem* tax was $2 a day for 24 days=$48, making his total tax for February, 1871, $359.71.

He ran the same tubs (8, 9, and 10) seven working-

days in March, 1871, when he ceased operations. His daily capacity then, we have seen, was 76.53⅓ gallons of spirit. 76.53⅓ × 7 = 535.73. Eighty per cent. of this is 428.58 gallons.

He reported and paid for 271 gallons, (Record, 18,) leaving him liable for 157.58 gallons at 50 cents, or	$78 79
(This 428.58 gallons would make 10.71 barrels.)	
At $4 per barrel, the tax was 10.71 × 4	42 84
The *per-diem* tax was 7 days, at $2	14 00
Making his total tax for March, 1871	135 63

agreeably to the terms of the first report.

Thus we have his December, 1870, tax	$648 85
His tax for January, 1871	465 65
His tax for February, 1871	359 71
His tax for March, 1871	135 63
And the total sum due on the bond in suit	1,609 84

The law under consideration, (act of July 20, 1868, c. 186, § 10, 15 Stats., 129,) printed on first page of my original brief, declares the purpose of the survey to be "to determine the true producing capacity" of the distillery. By the foregoing figures we have demonstrated that the survey is all that is needed to assess *all* the taxes required by the various provisions of this statute. If *no* returns are made, the distillery will be presumed to have run every working-day to its utmost permitted capacity, and be taxed for 80 per cent. of this capacity, for so many barrels as this quantity would fill, and for the daily consumption of corn thereby indicated. It is for the *distiller*, by his returns, payments, notices, &c., to reduce this taxation if he desires to do so.

We have shown that the jury had every element necessary to an *exact* computation of the taxes due under the bond in suit, even upon the basis of the *first* report of survey. We therefore humbly submit that the learned district judge erred when he refused to instruct that the defendant would be bound by the first report of survey if he received no other, and in giving as the reason of this refusal that no assessment was ever made upon the basis of this first report of survey. (Record, 10, folio 23.)

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